Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

JOHN BELSITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK ,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

Question Presented

Does New York State Vehicle and Traffic Law Section 1192.9 violate the due process clauses of the 5th and 14th Amendments to the United States Constitution where it permits a defendant to be convicted of a non lesser included charge without proper notice?

Parties to the Proceeding

The names of all the parties appear in the caption.

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Opinions Below

The petitioner, John Belsito, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, entered in The People of the State of New York v. John Belsito, on November 3, 1993.

The Honorable George Bundy Smith, Associate Judge of the New York Court of Appeals, issued a Certificate Denying Leave to appeal to that Court on December 14, 1993. That certificate is reprinted in the appendix hereto, p. 1a, infra.

The decision and order of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, dated November 3, 1993, upon information and belief has not been reported, and is reprinted in the appendix hereto, p. 3a, 4a, infra.

The oral decision of Judge Joseph C.

Calabrese of the Nassau County District Court during the pre-charge conference has not been reported. The portion of the transcript relating to the pre-charge conference is reprinted in the appendix hereto, p. 13a-23a, infra.

Jurisdiction

The Appellate Term of the Supreme Court of the State of New York for the 9th & 10th Judicial Districts, in its decision and order dated November 3, 1993, affirmed the petitioner's judgments of conviction of driving while intoxicated (Vehicle and Traffic Law §1192.3), unlicensed operation of a motor vehicle (Vehicle and Traffic Law §509.1), and speeding (Vehicle and Traffic Law §1180(b)), which had been rendered on March 13, 1992 in Nassau County District Court. See 3a, 4a, infra.

On December 14, 1993, the Honorable George Bundy Smith, an Associate Judge of the New York Court of Appeals, denied petitioner's

application for permission to appeal to the Court of Appeals. See p. 1a, 2a infra.

The jurisdiction of this Court to review the decision and order of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions, Statutes and Rules Involved

The following constitutional provisions and statute are involved in this case.

1. Whether the application of New York State Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case violated the Fourteenth Amendment to the United States Constitution:

. . . that no state shall "deprive any person of life, liberty, or property without due process of law." . . . .

2. Whether the application of New York State Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case

violated the Fifth Amendment to the United States Constitution in that the defendant was denied due process of law when he was not informed of the charges against him until after both sides had rested their cases. Article I, section 6 of the New York State Constitution provides:

. . . that "[I]n any court whatever the party accused shall ... be informed of the nature and cause of the accusation ...". (See Reasons for Granting the Writ).

3. New York State Vehicle and Traffic Law Section 1192.3 is not a lesser included charge to Section 1192.2 (See Reasons For Granting the Writ). Pursuant to Criminal Procedure Law Section 1.20 the definition of a "lesser included offense" is as follows:

. . . "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser

included offense." . . .

Statement of the Case

On December 9, 1990 at approximately 2:30 a.m., John Belsito was driving westbound on the Long Island Expressway in Nassau County, New York, (R. at 83; "R" referring to the official minutes of the trial), when he was signalled to pull his vehicle off to the side of the road by a Nassau County Police Officer. After pulling his vehicle off to the side of the road, the officer requested that Mr. Belsito produce a driver's license, vehicle registration and proof of insurance.

The officer requested Mr. Belsito to step outside his vehicle and to perform certain Field Sobriety Tests, after which he was placed under arrest and transported to the Central Testing Section of the Nassau County Police Department where he was requested to submit to a Breath Alcohol Test and additional sobriety tests. (R. at 135, 140).

At the conclusion of the tests the

defendant was charged with a violation of Vehicle and Traffic Law Section 1192.2 (per se driving while intoxicated), speeding, unsafe lane change, failure to signal and unlicensed operation. Mr. Belsito was arraigned upon a misdemeanor charge of violating Vehicle and Traffic Law (hereinafter referred to as "VTL") section 1192.2, based upon a Breathalyzer reading of .12%.

The defendant was arrested on December 9, 1990 and charged by Simplified Traffic Informations with per se driving while intoxicated (VTL section 1192.2), speeding (s. 1180b), unlicensed operation (s. 509.1), failure to signal lane change (s. 1163d), and unsafe lane change (s.1128a).

The matter was tried before the Honorable Joseph C. Calabrese, District Court Judge of Nassau County, commencing on October 8, 1991. The prosecutor, in his opening statement to the jury, stated:

> The first [Simplified Traffic Information] ... accuses John Belsito ... of

driving ... westbound on the Long Island Expressway ... in violation of New York State Vehicle and Traffic Law Section 1192.2 and the description of the operation is operating with .10 or more percent of alcohol in blood, to wit: .12 percent and it is affirmed under penalty of perjury by Gregory Celentano, the arresting officer.

(R. at 63-64). (see 5a-12a, infra). Not once did the Assistant District Attorney mention that the defendant was being charged with a violation of Section 1192.3.

After receiving testimony from the arresting officer, assisting officer, breath technician, Deborah Cox (a passenger in the Belsito vehicle) and Mr. Belsito, both sides rested their cases. In a conference prior to summations the Court addressed both parties as follows:

All right, now, before summations and in the absence of the jury and pursuant to CPL 300.10, I'm informing both sides that it's my intention to submit to the jury for their consideration, with respect to the first count, a violation of Section 1192.2 with which the defendant is charged, a violation of Section 1192.3 and a violation of Section 1192.1. With respect to each of the other counts the defendant is charged with, only the particular charge that he is charged with and no other charges.

(R. at 390) (see 13a, infra). The District Court based its decision to charge a violation of VTL Section 1192.3 upon VTL Section 1192.9 (formerly 1192.7), which provides:

> A driver may be convicted of a violation of subdivision one, two or three of this Section, notwithstanding that the charge laid before the Court alleged a violation of subdivision two or three of this Section, regardless of whether or not such conviction is based on a plea of guilty.

Immediately following the Court's announcement the defendant timely objected to the Court's proposed instructions on the basis that the defendant was charged with a violation of VTL Section 1192.2 and that the defendant was not previously notified of the charge of VTL Section 1192.3. (R. at 390-400). The defendant further argued that the prosecution had not amended the accusatory instrument to include the additional charge prior to trial, nor had the prosecution ever stated its intention to seek a conviction under VTL Section 1192.3.

The Court denied the defendant's due

process objection to the jury charge of VTL Section 1192.3 and subsequently submitted the Section two, three and one charges to the jury. (R. at 458-468).

In response to arguments made by defense counsel regarding lack of notice, the Honorable Joseph C. Calabrese stated, "I gather a due process argument is not viable either, because the defendant has better notice." (R. at 400), see 23a, infra).

With respect to the impact of the Criminal Procedure Law on Vehicle and Traffic Law Section 1192.9 (formerly 1192.7) the District Court stated:

> The People don't need an amended charge to get Section 1192.3 before the jury. All they need do is produce evidence that could lead a jury to show, prima facie that the defendant could be guilty of 1192.3. That's what they need. They don't need an amended accusatory instrument whatsoever.

(R. at 398-399) (see, "5a", infra).

The District Court, despite the lack of written or oral notice by the District Attorney, ultimately denied defendant's timely

objections to the submission of the 1192.3 charge to the jury and so charged the jury. (see generally R. at 459-468).

The jury returned a "not guilty" verdict to the charge of VTL Section 1192.2, yet returned a "guilty" verdict to Section 1192.3, the section that the defendant objected to on the basis of notice. (R. at 506, 507).

The defendant filed a motion to vacate the judgment pursuant to Criminal Procedure Law Article 440, together with a Memorandum of Law (see Appendix attached and made a part hereto). The motion was denied and the defendant appealed to the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts.

The decision of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts rendered its decision on November 3, 1993, wherein the three Justices of the Court concurred in stating, "In our opinion, Vehicle and Traffic

Law Section 1192(9) is constitutional and valid (See, People v. Farmer, 36 N.Y.2d 386; People v. Fielder, 78 Misc. 2d 7). (See Appendix)

Thereafter the defendant sought leave to the Court of Appeals of the State of New York. The Honorable Justice George Bundy Smith issued a Certificate Denying Leave to Appeal to the Court of Appeals on the 14th day of December, 1993.

Reasons For Granting the Writ

New York Vehicle and Traffic Law Section 1192.9 is unconstitutional on its face because it denies a defendant proper due process notice of the charges against him and permits a conviction of a non-lesser included charge.

A. The defendant was denied Due Process of Law when he was not informed of the additional charges against him until after both sides had rested their cases.

The central issue of this appeal concerns

whether the application of New York Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case violated the Fourteenth Amendment guarantee that no state shall "deprive any person of life, liberty, or property without due process of law." Although hundreds of books have been written and thousands of cases decided all centering on what due process exactly means, the fundamental notion that it all boils down to is notice. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard ... are basic in our system of jurisprudence". In re Oliver, 333 U.S. 257, 273 (1948). Justice Frankfurter in his dissenting opinion stated, "Due notice of the charge and a fair opportunity to meet it, are indispensable." In re Oliver, 333 U.S. 257, 284 (1948).

This due process guarantee of notice permeates through the jurisprudence of the state judicial systems as well. Article I,

section 6 of the New York State Constitution provides that "[I]n any court whatever the party accused shall ... be informed of the nature and cause of the accusation ...".

The New York Court of Appeals has stated, "The Constitution does require that the defendant be informed of the nature of the charge and the circumstances under which he is alleged to have violated the law." People v. Boback, 23 N.Y.2d 189, 195, 295 N.Y.S.2d 912 (1968).

The U.S. Court of Appeals for the District of Columbia formulated the following test for determining whether a defendant was given sufficient notice:

> The Constitution requires that the accused be informed "of the nature and cause of the accusation" (Amendment VI), and the cases interpret that to mean that he must be so definitely informed as to be enabled to present his defense. The test, say the courts, is whether the accused was misled.

Hallman v. United States, 208 F. 2d 825, 827 (U.S. App. D.C. 1953). In the present case, there was notice that the defendant was

charged with a violation of V.T.L. Section 1192.2 and that the defendant has a BAC of greater than .10%. This was also reiterated in the prosecution's Bill of Particulars. In fact the written accusatory instruments served upon the defendant together with the statements of the prosecution explicitly stated the charges against the defendant to be: speeding (1180(b)), unsafe lane change (1128(a)), failure to signal (1163(d)), unlicensed operation (509.1) and 1192.2 per se driving while intoxicated (1192.2), to wit: .12%. The defendant's sole theory of defense was to discredit probable cause for the arrest and the breathalyzer reading. The defendant was acquitted on the 1192.2 charged but was convicted on the 1192.3 charge, which was a crime that was never brought to the attention of the defendant until after both sides had rested and proposed jury charges were discussed. The result of the court's election to include the 1192.3 charge was that the jury

was allowed to consider a charge for which the defendant did not endeavor to present a defense.

The leading authority on this issue is the case of People v. Farmer, 36 N.Y.2d 386, 369 N.Y.S.2d 44, (1975). This case appears to hold that a simplified traffic information charging a violation of subdivision 3 of Section 1192 of the Vehicle and Traffic Law gives ample notice to the defendant that pursuant to 1196 (now amended as V.T.L. 1192.9, formerly 1192.7), defendant also faces the possibility of a conviction under subdivisions 1 and 3 of Section 1192 and that subdivisions 1, 2 and 3 are but a species of the same generic offense. Upon a closer look at the decision and the facts upon which it is based, it is indeed not a proper reading of the court's decision.

The main distinction between the facts in Farmer and this case are noted in Judge Fuchsberg's concurring opinion where he notes

that "the prosecutor indicated, during the Voir dire, and later during his opening to the jury, that he intended to seek a conviction under either subdivision 2 or 3 [of VTL Section 1192]. No surprise was claimed by the defendant, nor was an adjournment requested. The trial went forward." People v. Farmer, 36 N.Y. 2d 386, 391, 369 N.Y.S. 2d 44, 46 (1975).

The facts in the case at bar are entirely different. The defendant was not presented with neither written nor oral notice of the intent to charge a violation of 1192.3 prior to trial. Nor did the prosecutor during Voir dire or his opening statement to the jury indicate that he was seeking anything other than a conviction under 1192.2; in fact, he read to the jury the charge of 1192.2 as it appeared on the accusatory instrument. It was not until after both sides had rested their cases that the intention to charge a violation of 1192.3 was brought to the defendant's attention by the Court. As soon as the court

indicated its intention to add the additional charge the defendant timely objected to the inclusion of the charge based upon the failure to notify the defendant. Thus, the distinguishing issue between the cases is that the defendant timely objected and did not waive his right to due process. In the case at bar, this Court must decide whether the defendant in this case was given proper due process notice.

With respect to the question of whether a charge under any subdivision of 1192 provides the defendant with actual or constructive notice of a possibility of a conviction under any other subsection Judge Fuchsberg stated, "Section 1196 [now 1192.9] nowhere suggests that its mere existence on the statute books accomplishes [notice]." People v. Farmer, supra at 392. Judge Fuchsberg continued, "Therefore, Section 1192 itself did not give the defendant notice that a charge of subdivision 2 or 3 is a charge of

all three of its subdivisions in the absence of Section 1196 [now 1192.9] having been brought directly to this attention." People v. Farmer, supra at 393.

B. Vehicle and Traffic Law Section 1192.3 is not a lesser included charge to Section 1192.2.

Although the overriding issue in this case involves a due process question, the subject of lesser included offenses must be addressed because the Court in Farmer felt that it was able to uphold the Constitutionality of Section 1196 [now 1192.9] based upon a theory that somewhat parallels the concept that as in a lesser included situation a jury could find a defendant guilty of a non-charged crime.

Pursuant to Criminal Procedure Law Section 1.20 the definition of a "lesser included offense" is as follows: "When it is impossible to commit a particular crime without concomitantly committing, by the same

conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." See People v. Cruz, 48 N.Y. 2d 419, 423 N.Y.S. 2d 625. Criminal Procedure Law Section 220.20 establishes categories, under which conduct or culpable mental state must fall in order to be considered a lesser included offense. The defendant submits that there is no subsection of CPL Section 220.20 that would permit a court to charge a violation of VTL Section 1192.3 on the theory of a lesser included offense.

The elements required to prove a violation of section 1192.2, to wit: "operat[ion] ... while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis ...", are entirely different from the elements of Section 1192.3, to wit: "operat[ion] ... while in an intoxicated condition." Using the definition of a "lesser

included offense" it is clearly not "impossible to commit a particular crime without concomitantly committing" the other. See People v. Brown, 53 N.Y. 2d 979, 980, 441 N.Y.S. 2d 662, 663 (1981). For example, it is entirely possible for a defendant to have had a quantity of alcohol in his blood required for a conviction under subdivision 2 and yet not be found in an intoxicated condition under subdivision 3. Likewise, a defendant could be found to be in an intoxicated condition even though the level of the weight of alcohol in his blood fell below the ".10 of one per centum" statutory level.

Previously the Court of Appeals in dealing with this aspect of the issue in People v. Farmer validated the constitutionality of Section 1196 (now 1192.9, formerly 1192.7) under those particular circumstances by analogizing to a conviction of disorderly conduct versus harassment. The Court stated, "[A] conviction will be affirmed

if the evidence establishes a violation of any of the subdivisions of these sections. The distinctions involved are no greater, and indeed, are less than those in the charging and conviction for lesser or included offenses in the criminal law." People v. Farmer, 36 N.Y. 2d 386, 390-391, 369 N.Y.S. 2d 44, 45 (1975). Yet both the concurring and dissenting opinions reject this analysis: Concurring: "the facts of this case make it unnecessary to seriously consider applying the suggestion that [the three offenses] may be regarded as but a 'species' of a single 'generic offense'. People v. Farmer, supra at 393; Dissent: "An analogy is not to be made between these distinct independent offenses and categories of offenses deemed to be lesser included." People v. Farmer, supra at 395.

In People v. Caravalho, the Appellate Division of the Second Department rejected the defendant's argument that charging both subdivisions 2 and 3 violated the prohibition

against double jeopardy by stating, "It is clear that subdivisions 2 and 3 of the Vehicle and Traffic Law s. 1192 were intended to be separate crimes, neither mutually inclusive nor mutually exclusive." People v. Caravalho, 174 A.D. 2d 687, 571 N.Y.S. 2d 332, 333 (App. Div. 2nd Dept. 1991), app. den., 78 N.Y. 2d 1010 (Sept. 1991).

Thus, because the two subsections of Section 1192 are not lesser included offenses, the charge of Section 1192.3 should not have been submitted to the jury for their consideration where the only charge before the Court was an alleged violation of Section 1192.2.

Conclusion

For the reasons cited above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(516) 223-6270

Dated: March 14, 1994

State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

----------X

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JOHN BELSITO,

Appellant.

----------X

CERTIFICATE DENYING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York

December 14, 1993

/S/_____

Order of the Appellate Term, 9th & 10th Judicial Districts, entered November 3, 1993, affirming the judgment of the District Court, Nassau County, rendered March 1, 1992.

State of New York
Court of Appeals
George Bundy Smith
Judge

Court of Appeals
Hall
Albany, New York
12207

December 14, 1993

Keith A. Lavallee, Esq.
33 Guy Lombardo Avenue
Freeport, N.Y. 11520

Re: People v. John Belsito
Indictment No. 22790/90 District
Court, Nassau County

Dear Mr. Lavallee:

Enclosed you will find a copy of an order signed today denying your application for permission to appeal to the Court of Appeals in the above-referenced case.

Very truly yours,

/S/

George Bundy Smith

GBS:ba

cc: Robert A. Schwartz, Esq.
Assistant District Attorney, Nassau County
Clerk's Office
Court of Appeals

October 19, 1993 TERM

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts held in Westchester County, on November 3, 1993

Present-Hon. ANDREW J. DI PAOLA Presiding Justice

THOMAS M. STARK Associate Justice

DANIEL F. LUCIANO Associate Justice

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

--against--

JOHN BELSITO,

Appellant.

----------X

The above named appellant having appealed to this court from a judgments of the District Court of nassau County rendered on March 13, 1992 convicting him upon jury verdicts of driving while intoxicated (Vehicle and Traffic Law Section 1192[3], unlicensed operation of

a motor vehicle (Vehicle and Traffic Law Section 509[1]), and speeding (Vehicle and Traffic Law Section 1180[b]) and imposing sentences;

and the appeal having been submitted by KEITH A. LAVALLEE, ESQ., for the appellant and by ROBERT A. SCHWARTZ, ESQ. for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction are affirmed. All concur.

DISTRICT ATTORNEY'S OFFICE
CRIMINAL APPEALS BUREAU
262 OLD COUNTRY ROAD
MINEOLA, N.Y.

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

----------X

PRESENT: DiPAOLA, P.J., STARK
and LUCIANO, JJ.

----------X

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

-against- NO. 93-546 N CR

JOHN BELSITO, DECIDED

Appellant.

----------X

Appeal by defendant from judgments of the District Court of Nassau County (Calabrese, J.) rendered on March 13, 1992 convicting him upon jury verdicts of driving while intoxicated (Vehicle and Traffic Law Section 1192[3]), unlicensed operation of a motor vehicle (Vehicle and Traffic Law Section 509[1]), and speeding (Vehicle and Traffic Law Section 1180[b]) and imposing sentences.

Judgments of conviction are affirmed.

In our opinion, Vehicle and Traffic Law

section 1192 (9) is constitutional and valid (see, People v. Farmer, 36 NY 2d 386; People v. Fielder, 78 Misc 2d).

All concur.

here real late this morning. By the time we finished this morning's work, it was well after 1:00 o'clock, so we got started a little late this afternoon, but thank you very much for your promptness.

The next step in the trial is going to be the opening statement by the People.

MR. COPPERTINO: Thank you, your Honor.

May it please the Court, Mr. Lavallee, Ladies and Gentlemen of the Jury, as the Judge indicated yesterday, the People have an obligation to deliver an opening statement to the jury. Now, the purpose of the opening statement is for us to tell you what this case involves and what we expect to prove and with that in mind, permit me to read to you the Simplified Traffic Informations which charge the defendant with certain offenses under the Vehicle and Traffic Law. The first is under TI #2410634. It accuses John Belsito of 53

Neptune Avenue, North Babylon, New York of driving license plate number HL6311, New York registration, a commercial black '86 Ford truck on Sunday, December 9, 1990 at 2:35 a.m. westbound on the Long Island Expressway at Exit 41 in Jericho, County of Nassau, State of New York, in violation of New York State Vehicle and Traffic Law Section 1192.2 and the description of the operation is operating with .10 or more percent of alcohol in blood, to wit, .12 percent and it is affirmed under penalty of perjury by Gregory Celentano, the arresting officer.

That particular Simplified Traffic Information is also supported by what's known as a supporting deposition. I quote from that: "The People of the State of New York against John Belsito, Defendant. I, Police Officer Gregory J. Celentano, depose and say that on the 9th day of December I observed

subject operating a 1986 Ford pickup, New York registration HL3611 westbound Long Island Expressway at Exit 41, Jericho, in excess of the New York State speed limit of 55 miles per hour, to wit, 85 miles per hour. Subject also operated motor vehicle weaving from left to right lane to left lane. Vehicle stopped. Subject exited vehicle, staggered, swayed, bloodshot eyes and had the odor of an alcoholic beverage on his breath. Subject given standard field sobriety test" and this is signed under penalty of perjury by Gregory Celentano, a Police Officer of the Highway Patrol Bureau.

Defendant has also been charged under ticket number #TI2410660 with at the same time and place, with a violation of New York State Vehicle and Traffic Law Section 1163D, failed to signal lane change. That too is signed by the arresting Officer, Gregory Celentano.

And the next ticket is ticket #TI2410671,

which the defendant is charged with a violation of New York State Vehicle and Traffic Law Section 509.1, unlicensed operator and again, signed by the arresting Officer.

Simplified Traffic Information number #TI2410656, charges the defendant with a violation of New York State Vehicle and Traffic Law Section 1128A, unsafe lane changes and it is also signed by Police Officer Gregory Celentano.

And, finally, TI#2410646 charges the defendant with a violation of New York State Vehicle and Traffic Law Section 1180B, speed, radar, 85 miles per hour in a 55 mile per hour zone and this, like any other Simplified Traffic Informations is signed by the arresting Officer on the 9th day of December, 1990, under penalty of perjury.

Now, putting aside the rather formalistic language of the supporting deposition and the

Simplified Traffic Informations, this is simply a case about a man who got on the Long Island Expressway and drove while he was in an intoxicated condition. The People will prove their case by calling three Police Officers; Gregory Celentano, whom you've heard about. He's the arresting Officer and an Officer with over ten years of experience on the Nassau County Police force.

Officer Robert Scuderi, also an experienced Police Officer, who is the assisting Officer on December 9, 1990, the night in question;

And finally, Police Officer Robbert, also of the Highway Patrol Bureau. He has twenty-three years of experience. He was the breath technician that gave the breath tests and also had the defendant performed certain field sobriety tests as well.

Now, their testimony will take us back to Sunday night, December 9, 1990, and the Long

Island Expressway at around Exit 41, right here in our County of Nassau in the State of NewYork. Officer Celentano is on routine radar enforcement that night. He set up his radar from his police car at Exit 41 of the Long Island Expressway and he noticed headlights, headlights that would later turn out to be from a vehicle driven by the defendant. He estimated the speed of that vehicle that went by him, the pickup truck, at 85 miles per hour. That speed of that truck also produced a reading of his radar of 85 miles per hour. He also noticed that that vehicle was straddling two lanes of traffic on the Long Island Expressway in a westbound direction, so as that vehicle passed, Officer Celentano pursued it and he estimated the speed at over 90 miles an hour. He saw that vehicle weave from lane to lane. He saw that vehicle almost sideswipe two other vehicles, one to the right and one to the left and that

vehicle never signalled when it changed from lane to lane.

Officer Celentano was able to stop that vehicle and when he stopped it, the defendant was unable to produce a license, was asked to step out of the vehicle and had difficulty exiting the vehicle. There was an odor of alcoholic beverage on his breath. His eyes were bloodshot. He staggered, swayed and needed the vehicle to support himself. He was asked to perform certain field sobriety tests, asked to state the ABC's and was unable to do that. He was also unable to stand on one leg. He was arrested and transported back to the Police headquarters. An alcoholic odor was noted and present in the Police car when he was transported back and when he got back to Police headquarters, he was twice asked to give a breath test and he twice gave a breath test. Each time the reading was .12 percent

of blood alcohol. Again, he was asked to perform tests - a balancing test where he was just asked to stand up straight at attention and the Officer noted that he swayed four inches from side to side and four inches front and back. He was asked to do a simple walk and turn test, which he had to walk down nine steps in one direction and nine steps back in another direction. He was unable to perform that test and again, was asked to stand on one leg and again, he swayed and used his arms for balance and had to put his foot down.

In short, Ladies and Gentlemen, that is what the People intend to prove, that on the 9th day of December, 1990, the defendant operated a vehicle in an intoxicated condition; that he operated that vehicle with more than .10 percentage by weight of alcohol in his blood, by chemical analysis on his breath; that he moved unsafely from lane to lane without signalling the changes from those

lanes and that he operated without a license.

Ladies and Gentlemen, at the end of this trial, I will stand before you once again in what's known as summations and at that time Iwill ask you to find the defendant guilty as charged of all counts against him.

Thank you.

THE COURT: Thank you, Counsel.

Mr. Lavallee, do you wish to make an opening statement?

MR. LAVALLEE: Yes, your Honor.

Good afternoon, Ladies and Gentlemen. The defendant here stands before you accused of a crime. We discussed this yesterday, and the District Attorney just portrayed to you what he believed the testimony is going to put forth for you to determine whether or not those facts in fact happened. It's the defendant's position that he was not doing 85 miles an hour; he was not and did not in any event, in any way whatsoever, swerve and

almost miss a vehicle or cause an accident. I believe the testimony that you will hear will show otherwise. The defendant at the scene was not leaning on his car. In fact, hehad -- as soon as he was pulled over -- was pulled over toward the Police Officer's vehicle and had to stand by the Police Officer's vehicle.

The defendant was asked to perform

MR. COPPERTINO: No, thank you, Your Honor.

THE COURT: The motions are denied.

All right, now, before summations and in the absence of the jury and pursuant to CPL 300.10, I'm informing both sides that it's my intention to submit to the jury for their consideration, with respect to the first count, a violation of section 1192.2 with which the defendant is charged, a violation of section 1192.3 and a violation of section 1192.1.

With respect to each of the other counts the defendant is charged with, only the particular charge that he is charged with and no other charges.

Do the People wish to be heard on this submission?

MR. COPPERTINO: Yes, Your Honor. The People would just -- I'm sorry -- withdrawn.

THE COURT: Defendant?

MR. LAVALLEE: Yes, the defendant wishes to be heard, Your Honor. The defendant would object to being charged with 1192.3 in that the defendant here is charged on the docket number with 1192.2. In the People's opening statement, the People said they were charging this defendant with the violation of section 1192.2 and being now that it's the close of the case, there would be no way for me to adequately defend the charges of 1192.3.

THE COURT: People?

MR. COPPERTINO: Your Honor, the people are relying upon he statute and case law which permits the jury to be charged on 1192.3 in a case such as this.

THE COURT: Statutory question.

MR. LAVALLEE: Correct, Your Honor, and with respect to the People's -- I do not contest -- the People have the power to amend the charges. However, the people must do this either on written information prior to

beginning a case and not at the end of the case and being that the defendant has not been afforded the right to answer the questions and respond within the statutory time limits to a new charge being implemented, the defendant would hereby say we should object based upon the People's failure to provide us with a written amended charge of 1192.3.

THE COURT: People?

MR. COPPERTINO: Your Honor, again, the People rely upon the statutory provisions -- I believe it is under section 1192.7, is it?

THE COURT: No. That's the program, I believe at this point. This book in front of me is not up to date.

MR COPPERTINO: Unfortunately, my statute isn't either, but I believe the gist of the statute is that once a defendant has been charged under 1192.2, it's statutory that along with it goes 1192.3 and 1192.1 and I

believe the defendant has been on sufficient notice, being it's the intent of the legislature of the State of New York to have such a charge occur in a case like this.

THE COURT: Yes, you want to be heard again?

MR. LAVALLEE: Yes, Your Honor. With regard to the People's opening statement, in their statement, they specifically mentioned 1192.2, the Breathalyzer reading and I would submit to the Court that the People would then have made a defective opening statement and I also have a motion to dismiss with respect --

THE COURT: You don't understand what's being said here. What's being said here, it's statutory that with respect to it, what he's charged with, that the three also gets charged.

MR. LAVALLEE: Statutory -- You Honor, the People have the power to do it. I do not believe that one goes and one must be charged

with another.

MR. COPPERTINO: If I just may have a minute, Your Honor?

THE COURT: Yes.

MR. LAVALLEE: Judge, If I might --

THE COURT: Wait just a moment, so we can clarify this issue.

MR. COPPERTINO: Your Honor, my 1989 edition, it's 1192 subdivision 7 and the subtitle is conviction of a different charge.

THE COURT: I believe they changed the number now, but it's the same section.

MR. COPPERTINO: I'm sure the Court is right about that, but I don't believe -- although the enumeration is different, I believe it still reads exactly the same way, that is; a driver may be convicted of a violation of subdivision 1, 2 or 3 of this section, notwithstanding that the charged laid before the Court alleged a violation of subdivision 2 or 3 of this section and

regardless of whether or not such conviction is based upon a plea of guilty.

THE COURT: Yes, that's the provision. That's why, generally, in these cases, all three sections are charged, when a defendant is charged with just section 1192.2.

MR. LAVALLEE: However, Your Honor, this is now the end of the case. I mean, if the People had made this motion prior to the beginning of the case, then defendant would have been able to effectuate an adequate defense.

THE COURT: They didn't make any motion, so the record's clear. I think the record is clear. I indicated what I was going to submit. They don't make a motion.

MR. LAVALLEE: You didn't indicate on the record what you are going to charge, prior to trial.

THE COURT: I'm indicating to you now. It's required by law at the close of the

evidence, that I intend to submit all three charges.

MR. LAVALLEE: That's why I'm objecting.

THE COURT: But the People didn't have to make a motion in that regard or request it in that regard. That's what I indicated that I would be charging based upon the statute.

MR. LAVALLEE: Correct, Your Honor.

THE COURT: It's possible for the jury to find the defendant not guilty of two and guilty of three, based upon the common law intoxication, as lawyers usually refer to it.

MR. LAVALLEE: Judge, my problem here is we were charged with a specific violation of the law, to wit, 1192.2, a Breathalyzer reading. We were not charged with 1192.3 and I do have a motion in limine, which I suggest that you allow me to submit to the Court and the Court can make its determination. It's only two pages.

THE COURT: Go ahead, I'll read it.

It has to do with subject matter?

MR. LAVALLEE: Absolutely. Disregard number one, but it's schedule two.

Your Honor --

THE COURT: Wait just a minute. Are you going to add something in favor of the motion?

MR. LAVALLEE: Just going to explain to the Court, had I been aware that the Court was going to charge this, I would have submitted this prior to today. I was assuming, since the People in their opening statement said 1192.2, that that would be the case.

THE COURT: Yes, you want to be heard, Mr. Coppertino?

MR. COPPERTINO: Your Honor, first, with respect to defense counsel's submission of surprise, I submit that this written motion in limine belies that fact. In other words, if he was surprised, how would he have time to draft a motion such as this?

Second, with regard to surprise on the People's opening statement, although we did not mention the exact section, 1192.2, the opening statement clearly went into all the so-called common law indicia of intoxication, so defense counsel could not have been surprised that way either.

Finally, with regard to the case law that the defendant cites, People versus Dumas, it does not -- it is my belief, Your Honor, that this is not a case like this one, which relies upon the statutory provisions of the vehicle and traffic law, permitting a charge to be given by the Judge on all three violations of section 1192, if the facts permit. It deals with a misdemeanor complaint.

THE COURT: Yes, gentlemen. The proper section of 1192.2 -- the reason why you thought it was 1192. and that section provides convictions of a different charge -- a driver may be convicted of a violation of subdivision

1, 2 or 3 of this section, notwithstanding that the charge laid before the Court alleged a violation of subdivision 2 or 3 of this section and regardless of whether of not such conviction is based on a plea of guilty.

The key to this point is the same as any other charge that a judge would submit to a jury. The question is by a reasonable interpretation of the facts could a jury find that this defendant, based on the evidence that's presented, is guilty of three and the answer is yes and the statute provides that it should be charged in that instance. If the People came in here and the only evidence they presented, without adding evidence -- peripheral evidence of breath, eyes, coordination and only presented evidence purely of the test itself, then your arguments certainly would be viable, but they have come in and they have offered evidence of much more than just the test, so it's possible this jury

could determine from the evidence that 1192.3 is an appropriate charge, but disregard the test. And, I've had that happen with juries on occasion, where they found the defendant guilty of three and disregarded the test.

MR. LAVALLEE: With respect to that, Your Honor, as far as being on notice from these indications such as field sobriety tests, slurring of the speech, blood shot eyes, those all went towards probable cause. I was assuming that these were being introduced as probable cause during the Breathalyzer technician's testimony. I did make an objection to the Court that it was outside the -- I forget exactly. My objection was to his testimony as to the field sobriety test and I was objecting to that because we were only being charged with 1192.2 with respect to the surprise and I have no objection at all with allowing the District Attorney's office to have time to respond to this. I did prepare

two separate motions in limine, which I was anticipating that a formal amending of the charges would be given to the Court prior to the opening statement and/or sometime during it and at that time I would have submitted my motion and there was another motion which I was also prepared to submit, but I did not submit because the People came forward with the discovery that I needed.

THE COURT: I think the statute's clear. The People don't need an amended charge to get section 1192.3 before the jury. All they need do is produce evidence that could lead a jury to show, prima facie that the defendant could be guilty of 1192.3. That's what they need. They don't need an amended accusatory instrument whatsoever.

MR. LAVALLEE: It's the defendant's position that the People do have the power and the statute does allow that. However, it is the defendant's position that in order for the

People to do that, the defendant's entitled to written charges or if he wants, he can stipulate having them on the record. The defendant was not given a written amendment of the charges or a stipulation allowing the 1192.3 - not that we need to be allowed, but just to waive the written accusatory instrument. If there was a written accusatory instrument, the defendant would have been able, and be in fact required to be given statutory time limits in which to answer these new charges and being there is no written or formal amendment of the charges until now, at the close of the case, the defendant would submit to this Court that the defendant would be unable now to defend against the charge of 1192.3.

THE COURT: First of all, there is no formal amendment that's being made here. Again, it's a question of statute. The statute is what permits the charge, if there

is evidence in the case to support the charge. The argument which you're making and I gather a due process argument is not viable either, because the defendant has better notice. He's got statutory notice that 1192.3 can be charged to the jury, so your application is denied.

MR. LAVALLEE: Okay, note my objection for the record.

THE COURT: Yes. Now, does anyone else want to be heard on any of the other charges to be submitted?

MR. LAVALLEE: Your Honor, I did prepare a defendant's request to be charging the jury.

THE COURT: I'm not asking for those at this time. I'm still on the submission. Let's finish up with that. Any other objections on the submissions?

MR. COPPERTINO: No, Your Honor, none from the People.

MR. LAVALLEE: What submission?

THE COURT: What charges are being submitted to the jury?

MR. LAVALLEE: No.

(2)

Supreme Court, U.S.
FILED
JUL 25 1994
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No. 93-1790

In The

Supreme Court of The United States

October Term, 1993

JOHN BELSITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE NEW YORK STATE SUPREME COURT, 9TH AND 10TH JUDICIAL DISTRICTS

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

QUESTION PRESENTED

Whether Petitioner had fair notice of the driving-while-intoxicated charge for which he was convicted, as required by the due process and notice provisions of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, where it was well-established in the state, by statute and case law, that a person may be convicted of that offense when charged with a related offense that prohibits the operation of a motor vehicle by a person with a specific blood-alcohol content.

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PRELIMINARY STATEMENT

Respondent requests that this Court deny John Belsito's (hereinafter "defendant") petition for a writ of certiorari seeking review of an order of the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts, which affirmed his judgment of conviction for operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[3]) ("common law intoxication"), unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]), and speeding (New York Vehicle and Traffic Law § 1180[b]).

OPINIONS BELOW

Defendant's judgment of conviction was affirmed by the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts. The decision and order of that court are unreported, but are reproduced in defendant's petition at pp. A4-A7. The New York Court of Appeals denied defendant's application for leave to appeal to that court. *People v. Belsito*, 82 N.Y.2d 891, 632 N.E.2d 468 (1993).[1]

JURISDICTIONAL STATEMENT

This Court has jurisdiction of the petition pursuant to

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[1] The cover of defendant's petition states erroneously that it is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. This case was never heard by the Second Circuit or any other federal court.

28 U.S.C. § 1257(3), but the petition is untimely. The decision of the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts, affirming defendant's judgment of conviction, was entered on November 3, 1993. The order of the New York Court of Appeals, denying defendant's application for leave to appeal to that court was entered on December 14, 1993. Defendant's petition for certiorari was filed on March 16, 1994, ninety-two days after his application for leave to appeal to the New York Court of Appeals was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI

"In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."

United States Constitution, Amendment XIV

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

New York Vehicle and Traffic Law § 1192(1)

"Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol."

New York Vehicle and Traffic Law § 1192(2)

"Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood . . . ."

New York Vehicle and Traffic Law § 1192(3)

"Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition."

New York Vehicle and Traffic Law § 1192(7) (now designated section 1192[9])

"Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty."

STATEMENT OF THE CASE

Introduction

On December 9, 1990, at approximately 2:30 a.m., defendant was travelling westbound on the Long Island Expressway; he was driving eighty-five miles per hour and weaving between lanes. After he was stopped by the police, he was unable to produce a driver's license. Defendant's eyes were bloodshot, his speech was slurred, his breath smelled of alcohol, he staggered when he walked, and he failed two field sobriety tests. Subsequent breathalyzer testing revealed that he had .12 of one percent of alcohol in his blood. For his acts, defendant was charged with

operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[2]) (operating a motor vehicle with a blood-alcohol level of .10 of one percent or more), speeding (New York Vehicle and Traffic Law § 1180[b]), failure to signal (New York Vehicle and Traffic Law § 1163[a]), unsafe lane change (New York Vehicle and Traffic Law § 1128[a]), and unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]).

The Trial

The People's Case

On December 9, 1990, Nassau County Police Officer GREGORY CELENTANO, of the Highway Patrol Bureau, was assigned to patrol the Long Island Expressway between exits 40 and 48. At 2:30 a.m., he was on the westbound shoulder of the expressway, between exits 40 and 41, when he observed the defendant travelling west in a black pick-up truck at a high rate of speed. Celentano estimated defendant's speed at eighty-five miles per hour and then confirmed it with his radar equipment. As defendant's vehicle passed, Celentano observed that it was straddling the line between the right and center lanes. It then weaved toward the left lane (Celentano: 73-88).[2] Celentano followed defendant's vehicle and radioed its direction. Defendant increased his speed to between ninety and ninety-five miles per hour and

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[2] Unless otherwise specified, numbers in parentheses refer to pages in the trial transcript. Numbers preceded by the letter "S" refer to pages in the sentencing minutes. The names preceding the page numbers refer to the witnesses whose testimony is recounted.

weaved into the right lane, forcing another vehicle to swerve out of his way. Defendant then weaved back into the left lane, causing another vehicle to brake hard. Celentano waited approximately three-quarters of a mile before turning on his emergency lights so that he could stop defendant in a lighted portion of the expressway (Celentano: 88-90, 129).

Police Officer ROBERT SCUDERI was patrolling the eastbound side of the expressway at exit 37 when he heard over the radio that Celentano was following the defendant. Scuderi made a U-turn at exit 38 and waited for the defendant to approach. Moments later, the defendant and Celentano passed by. Scuderi observed that defendant's vehicle was straddling the left and center lanes and travelling approximately eighty-five miles per hour. Defendant's vehicle was stopped approximately one and one-half miles further down the road, between exits 36 and 37 (Scuderi: 162-68).

Celentano walked up to defendant's vehicle on the driver's side, and Scuderi approached from the opposite side. In addition to the defendant, a female passenger was seated in the vehicle. Defendant could not produce a driver's license, and Celentano smelled alcohol on his breath. After Celentano asked defendant to exit the vehicle, he noticed that the defendant held onto the truck to maintain his balance. Celentano and Scuderi further observed that the defendant staggered and swayed as he walked, had bloodshot eyes, and had slurred speech. Defendant was given two field sobriety tests: the "Alphabet Romberg" test and the "one legged stand" test. Defendant failed them both. Based on his erratic driving, the odor of alcohol on his breath, his bloodshot eyes, his stagger, and his poor performance on the field sobriety tests, Celentano and Scuderi concluded that defendant was intoxicated (Celentano: 90-94, 103-04; Scuderi: 171-77).

Defendant was arrested and transported to the Central Testing Unit of the Nassau County Police Department. Defendant initially refused to submit to a breathalyzer test, but, after making a phone call, agreed to take the test (Celentano: 96-102). Police Officer DONALD ROBBERT, a certified breathalyzer technician, administered two tests to defendant: the first at 3:45 a.m., and the second at 3:52 a.m. Both tests revealed that the blood-alcohol content of defendant's blood was .12 percent (Robbert: 211-19, 247-50). Robert then asked defendant to perform a series of agility tests. Defendant attempted the tests, but was unable to perform them satisfactorily. During the balance test, defendant exhibited a four-inch sway and was unable to stand still. During the "finger to nose" test, defendant was unable to touch his finger to the tip of his nose on four of six attempts. Robbert further detected that defendant had alcohol on his breath, slurred his speech, and staggered when he walked. Robbert concluded that defendant was "obvious[ly]" intoxicated (Robbert: 253-56, 259).

The Defendant's Case

The defendant, JOHN BELSITO, and his friend, DEBORAH COX, admitted that defendant consumed three or four beers between 1:15 and 1:30 a.m. They acknowledged that defendant was speeding before he was stopped by the police, but they denied that he was driving erratically and that his speech was slurred (Cox 360-62, 371; Belsito: 374-76).

The Verdict and Sentence

Pursuant to former New York Vehicle and Traffic

Law § 1192(7), [3] the court submitted to the jury for its consideration New York Vehicle and Traffic Law § 1192(3) ("common law intoxication"), as well as New York Vehicle and Traffic Law § 1192(2) (operating a motor vehicle with a blood-alcohol level of .10 percent or more) and the other charges in the information.[4] Following its deliberations, the jury found defendant guilty of operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[3]) ("common law intoxication"), speeding (New York Vehicle and Traffic Law § 1180[b]), and unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]). Defendant was found not guilty of the remaining charges that the jury considered (506-07). On March 13, 1992, defendant was sentenced to three years' probation and ordered to pay five

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[3]

At the time of defendant's trial, New York Vehicle and Traffic Law § 1192(7) provided: "Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty." 1988 N.Y. Laws ch. 47, § 18, amended by 1990 N.Y. Laws ch. 173, § 62 (redesignating subd. 7 of Vehicle and Traffic Law § 1192 as subd. 9).

[4]

The court also submitted New York Vehicle and Traffic Law § 1192(1) (driving while ability impaired). The jury was instructed, however, to consider that charge only if it did not find the defendant guilty under either New York Vehicle and Traffic Law § 1192(2) or § 1192(3) (446).

hundred dollars in fines (S. 6-7).

The State Court Appeals

On appeal to the Appellate Term of the New York Supreme Court, 9th and 10th Judicial Districts, defendant argued that he was not given adequate notice that he faced conviction under New York Vehicle and Traffic Law § 1192(3), notwithstanding the existence of former section 1192(7), which he assailed as unconstitutional.

On November 3, 1993, the Appellate Term unanimously affirmed defendant's conviction. Relying on *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 (1975) and *People v. Fielder*, 78 Misc. 2d 7, 358 N.Y.S.2d 263 (Sup. Ct. App. Term 9th & 10th Jud. Dists. 1974), the court held that New York Vehicle and Traffic Law § 1192(7), which had since been redesignated New York Vehicle and Traffic Law § 1192(9), is constitutional and that defendant had sufficient notice of the charges against him. On December 14, 1993, defendant's application for leave to appeal to the New York Court of Appeals was denied. *People v. Belsito*, 82 N.Y.2d 891, 632 N.E.2d 468 (1993) (Smith, J.).

REASONS FOR DENYING THE WRIT

Defendant's petition for a writ of certiorari should be denied for two reasons. First, the petition is untimely, and defendant has not offered any explanation for his failure to comply with Rules 13.1 and 29.2 of the Rules of this Court, nor presented this Court with any compelling reason for excusing his tardiness. *See* R. Stern & E. Gressman, *Supreme Court Practice* 389 (5th ed. 1978). Second, there are no "special and important" reasons for granting review in this case. Rules of the Supreme Court, Rule 10.

Defendant's claim is completely meritless, and does not present any novel or unsettled legal issue deserving of this Court's review.

I. DEFENDANT'S PETITION IS UNTIMELY AND SHOULD NOT BE REVIEWED BY THIS COURT.

The rules of this Court require that a petition for a writ of certiorari seeking review of a judgment of a lower state court be filed with the Clerk within ninety days after the state court of last resort has entered an order denying discretionary review. Rules of the Supreme Court, Rule 13.1. Defendant's petition is untimely because it was filed with the Clerk of this Court ninety-two days after the New York Court of Appeals entered its order denying defendant's application for leave to appeal.

Defendant's application for leave to appeal to the New York Court of Appeals was denied on December 14, 1993. The order denying defendant's application was entered on the same day. *See* certified copy of Certificate Denying Leave and letter from the New York Court of Appeals, annexed hereto as A1-A2. Defendant's petition was not delivered to the Clerk of this Court until March 16, 1994.[5] Because the

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5 Defendant's petition, received by the Clerk on March 16, 1994, was returned to him, pursuant to Rule 33.7, for failure to comply with this Court's rules. *See* letter from the Clerk of the Court to defendant's counsel dated March 17, 1994, annexed hereto as A3-A4. Defendant thereafter refiled his petition on or about May 9, 1994. Although Rule 33.7 contains a tolling provision for improperly prepared documents, this provision is of no benefit to defendant because his initial filing, received by the Clerk on March

petition was delivered by United Parcel Service, a private delivery service, it was not deemed filed until actually received by the Clerk, *i.e.*, on March 16, 1994. Rules of the Supreme Court, Rule 29.2. The petition, therefore, was not filed with this Court until ninety-two days after the New York Court of Appeals entered its order denying defendant's application for leave to appeal. Accordingly, the petition was untimely.

Moreover, this Court should not excuse defendant's tardiness and review the petition in the interest of justice. *See generally Schacht v. United States*, 398 U.S. 58, 63-64 (1970). Unlike the petitioner in *Schacht*, the defendant here, who has been represented by retained counsel throughout the litigation, never moved for an extension of time to file his petition. Furthermore, in *Schacht* the defendant gave reasons for his delay, which this Court characterized as beyond the petitioner's control. In this case, by contrast, the defendant has offered no explanation for his delay. Significantly, he does not even acknowledge that his petition is untimely. Absent some showing by defendant that there are compelling reasons for this Court to overlook his tardiness, his application should be denied. *See* R. Stern & E. Gressman, *supra*, at 389.

Defendant's handling of this petition is similar to the way the appellant in *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32 (1966), prosecuted its appeal. In both cases there was no application to extend the time for filing the appeal or petition, neither party offered this Court a satisfactory explanation for the untimely filing, and both parties ignored the issue in their jurisdictional statement. In dismissing the appeal in

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16th, was already untimely.

Pittsburgh Towing Co., this Court stated:

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

385 U.S. at 32-33. In this case too, defendant's failure to comply with the rules of this Court and file his petition in a timely manner should not be excused. Defendant has offered no explanation for his delay and there are no compelling issues presented by this case that warrant review (*see* point II, *infra*). Accordingly, defendant's petition should be denied.

II. DEFENDANT'S PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION THAT IS EITHER NOVEL OR UNSETTLED. MOREOVER, DEFENDANT WAS NEITHER DENIED DUE PROCESS NOR DEPRIVED OF NOTICE UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defendant argues that he was not given adequate notice prior to trial that he faced conviction under New York Vehicle and Traffic Law (hereinafter "V.T.L.") § 1192(3), notwithstanding the existence of both a well-settled body of

case law in the state and a statute, which he assails as unconstitutional, that explicitly provided the basis for the jury's consideration of that charge. Defendant's claim is completely meritless and, therefore, undeserving of this Court's review. In fact, there is no conflict of decisions concerning the issues underlying his claim nor any unsettled legal issues that need this Court's resolution in this case. *See* Rules of the Supreme Court, Rule 10; R. Stern & E. Gressman, *supra*, at 287.

New York's "drunk driving" statute, V.T.L. § 1192, sets forth three independent ways that a person may commit the generic offense of driving while under the influence of alcohol. Subdivision 1 prohibits a person from operating a motor vehicle while the person's ability is impaired by alcohol. Subdivision 2 prohibits a person from operating a motor vehicle while the person has a blood-alcohol level of .10 of one percent or more ("*per se* intoxication"). And subdivision 3 prohibits a person from operating a motor vehicle while in an intoxicated condition ("common law intoxication").[6]

By definition, these three offenses share a common purpose: to prohibit the operation of a motor vehicle by a person under the influence of alcohol. In addition, the proof establishing a person's guilt of these offenses will frequently, if not inevitably, overlap. Accordingly, recognizing the interrelationship between these three offenses, the legislature has provided that each of these offenses need not be separately alleged in an accusatory instrument. Subdivision 9 of V.T.L. § 1192 (which was designated subdivision 7 at

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[6] Subdivision 4 of this statute prohibits operating a motor vehicle while one's ability is impaired by drugs.

the time of defendant's arrest and prosecution) expressly provides that a person may be convicted of violating any of these subdivisions notwithstanding that the charge laid before the court alleges a violation of only subdivision 2 or 3.[7]

Thus, New York's statutory scheme itself makes it plain to all persons charged with violating V.T.L. § 1192(2), such as defendant, that they also face conviction under subdivision 3, provided, of course, that the evidence supports such a conviction. It, therefore, should have come as no surprise to defendant when during the trial the People sought to prove, as authorized by statute, that defendant operated a motor vehicle while his blood-alcohol level exceeded .10 of one percent (V.T.L. § 1192[2]) and that he did so while in an intoxicated condition (V.T.L. § 1192[3]) ("common law intoxication"). Moreover, prior to summations and the jury's deliberations, the court disabused defendant of any misunderstanding that he may have had concerning the law's application to his case. At its pre-charge conference, the trial court informed defendant that, in addition to submitting the V.T.L. § 1192(2) charge, it would also instruct the jury to consider whether defendant had violated subdivisions 1 (driving while impaired) and 3 ("common law intoxication") of that section. The court explained to defendant and his attorney that subdivision 7 (now subdivision 9) of section 1192 explicitly authorized the jury's consideration of these additional charges.

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[7] A charge of violating subdivision 1 alone is not enough to support a prosecution for subdivisions 2 and 3. The offense defined in subdivision 1 is a "traffic infraction," which is a less serious offense than the misdemeanors defined by subdivisions 2 and 3.

In addition to the statutory scheme, the case law in New York provided notice to defendant of his potential criminal exposure and support for the trial court's action. Nearly twenty years earlier, in *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 (1975), the state's highest court upheld as constitutional former V.T.L. § 1196 (1970 N.Y. Laws ch. 47, § 6), the earliest forerunner to V.T.L. § 1192(9). In that case, rejecting a "fair notice" challenge virtually identical to the current claim, a majority of the court held that the statute gives persons charged with subdivision 2 or 3 of section 1192 "ample notice" that they may be convicted under subdivisions 1, 2, or 3. The court reasoned that these offenses "closely overlap and are but species of the same generic offense . . . ." *Farmer*, 36 N.Y.2d at 390, 330 N.E.2d at 22-23. Thus, because the distinctions between the three specific offenses "are no greater, and indeed, are less than those involved in the charging and conviction for lesser included offenses in the criminal law," the court concluded it was not unfair to treat them as such. *Id.* at 390-91, 330 N.E.2d at 23.

Shortly after *Farmer*, the state legislature addressed the due process concerns expressed in the concurring and dissenting opinions in that case. So as to enhance the notice provided to persons accused of operating a motor vehicle while under the influence of alcohol in violation of V.T.L. § 1192, the legislature amended the law to include directly in that section the notice provision that had, until then, been situated in section 1196.[8] As a result, persons accused of

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[8] Former section 1196 was initially recodified as V.T.L. § 1192(7) -- its designation at the time of defendant's criminal conduct, arrest, and prosecution. 1988 N.Y. Laws ch. 47, § 18. It has since been redesignated as V.T.L. § 1192(9).

violating any of the alcohol-related offenses enumerated in V.T.L. § 1192, such as defendant, need only read that section to learn the extent of their possible criminal exposure.

Notwithstanding the textual proximity of these various provisions and the inextricable relationship between "*per se* intoxication" (V.T.L. § 1192[2]) and "common law intoxication" (V.T.L. § 1192[3]), defendant maintains that some additional notice was required. His claim is unsupported by logic or case law, and does not merit review. Defendant fails to cite a single case where a court has held that a statutory provision similar to V.T.L. § 1192(9) was unconstitutional on due process grounds or for any other reason. Nor has he demonstrated that there is a conflict among the states, among the federal circuit courts, or between the state and federal courts on this issue.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" is incorporated within the Due Process Clause of the Fourteenth Amendment, and guarantees to all persons the right to reasonable notice of the charges and a fair opportunity to defend against them. *Cole v. Arkansas*, 333 U.S. 196 (1948); *In re Oliver*, 333 U.S. 257 (1948). The Constitution does not require, however, that all charges upon which a defendant may be convicted be specifically pleaded in the accusatory instrument. Thus, for example, the law is well settled that where all of the elements of an uncharged crime are contained within a charged offense, the defendant is deemed to have sufficient notice of the lesser included offense as well. *Paterno v. Lyons*, 334 U.S. 314, 320-22 (1949); *see also Schmuck v. United States*, 489 U.S. 705, 718 (1989) (no "fair notice"

1990 N.Y. Laws ch. 173, § 62.

violation where uncharged offenses satisfy "strict elements" test for lesser included offense doctrine); *State v. Gilman*, 673 P.2d 1085 (Idaho App. 1983) (lesser included offense doctrine is not limited to offenses less serious than offense charged).

Moreover, the "fair notice" requirements of the Constitution may be satisfied through other means even where the uncharged offense underlying the conviction is not a lesser included offense of any of the charged offenses. In *Franklin v. White*, 803 F.2d 416 (8th Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987), for example, the court upheld a conviction for an uncharged crime, notwithstanding that it was not a lesser included offense of any of the charged offenses, because it was apparent that the accused had actual knowledge that he would be tried on the uncharged offense. And, in other instances, as in this case, due process can be satisfied by providing the defendants with statutory notice that they may be expected to defend against a related uncharged offense. *See Asherman v. Meachum*, 739 F. Supp 718 (D. Conn.), *aff'd*, 923 F.2d 845 (2d Cir. 1990); *cf. State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988).

In *Asherman*, the defendant was indicted for murder, but convicted after trial of manslaughter in the first degree. Under Connecticut's "strict elements" test for defining lesser included offenses, manslaughter in the first degree is not technically a lesser included offense of murder.[9]

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[9] Under the "strict elements test," all of the elements of the lesser included offense must be contained in the greater offense, making it impossible to commit the greater offense without first having committed the lesser offense. *See Schmuck*, 489 U.S. at 718-19. In Connecticut, manslaughter

Nevertheless, a Connecticut statute (C.G.S. § 53a-45[c]), and decisions of the Connecticut Supreme Court interpreting that statute, gave the defendant sufficient notice that, by virtue of the murder charge, he could be convicted of any lesser degree of homicide, including manslaughter in the first degree. The court concluded that "[i]n view of the plain language of [the statute] and the jurisprudence of Connecticut's highest court at the time of petitioner's indictment, trial and conviction, petitioner had constitutionally sufficient notice that he could be expected to defend against a charge [not contained in the indictment]." *Id.* at 723.

The reasoning in *Asherman* is applicable here. In neither case was the offense for which the defendant was convicted a lesser included offense of the original charge.[10] In both cases, however, there was a statute that expressly stated, and thereby afforded the defendant fair notice, that he could be convicted of the uncharged offense. Moreover, in both cases the highest court in the state had previously acknowledged and approved of the statute as a method of satisfying the "fair notice" component of due process.

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in the first degree is not technically a lesser included offense of murder because manslaughter in the first degree requires a state of mind (extreme emotional disturbance) that is not an element of murder. *See Asherman*, 739 F. Supp. at 722.

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New York, like Connecticut, uses the "strict elements" test for defining lesser included offenses. New York Criminal Procedure Law §§ 1.20(37), 300.50. Under this test, V.T.L. § 1192(3) is not a lesser included offense of § 1192(2). *See also Farmer*, 36 N.Y.2d at 393, 330 N.E.2d at 24 (Fuchsberg, J., concurring).

Indeed, there is even a stronger basis in this case than in *Asherman* to conclude that the defendant had notice of the need to defend against the charge for which he was convicted. In this case, the statutory notice provision as well as the various offenses -- charged and uncharged -- upon which defendant faced conviction were all set forth in V.T.L. § 1192. The "textual proximity" of these statutory provisions, while not dispositive, is clearly a significant factor in determining whether defendant had constitutionally sufficient notice. *United States v. Brewster*, 506 F.2d 62, 74, 75 n.32 (D.C. Cir. 1974); *see also* Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 453 (1984). Unlike the defendant in *Asherman*, the defendant in this case did not even have to turn to another statute to learn that he was also subject to prosecution upon the charge for which he was ultimately convicted. Moreover, the statutory notice provision in the instant case is clear and unambiguous. Unlike the defendant in *Asherman* who, when charged with murder, had to determine which offenses were homicides of a lesser degree, the statute here expressly provides that "[a] driver may be convicted of a violation of subdivision one, two or three of this section notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section . . . ." V.T.L. § 1192(9).

Defendant would also have this Court ignore the close relationship between the offense charged ("*per se* intoxication") and the offense for which he was convicted ("common law intoxication"). As the New York Court of Appeals recognized years ago in *Farmer*, where penal statutes are "logically related" (*Brewster*, 506 F.2d at 74) or, as here, "species of the [same] generic offense" (*Farmer*, 36 N.Y.2d at 390, 330 N.E.2d at 23), and are designed to remedy the same wrong, there is a greater likelihood that a defendant will be aware of the need to defend against the

uncharged offense. *cf. Asherman*, 739 F. Supp. at 723 (grouping of related offenses within statutory scheme provides notice that crime with less culpable state of mind is lesser included offense of one requiring more culpable state of mind). This is especially true in New York when a defendant is charged with a violation of V.T.L. § 1192, because evidence of a defendant's blood-alcohol level is admissible regardless of the theory of intoxication or impairment. V.T.L. § 1195(1). Likewise, evidence of "common law intoxication" (bloodshot eyes, slurred speech, etc.) is admissible to support a charge of "*per se* intoxication." *See People v. Abel*, 166 A.D.2d 841, 563 N.Y.S.2d 531 (3d Dept. 1990).

In sum, the existence of a clear statutory notice provision, coupled with the eighteen-year history of state case law applying and upholding that statutory notice provision and its predecessors (*see, e.g., People v. Kelly*, 39 N.Y.2d 1048, 355 N.E.2d 386 [1976]; *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 [1975]; *People v. Clapper*, 123 A.D.2d 484, 506 N.Y.S.2d 494 [3d Dept. 1986]; *People v. Fielder*, 78 Misc. 2d 7, 358 N.Y.S.2d 263 [Sup. Ct. App. Term 9th & 10th Jud. Dists. 1974]), was more than sufficient to afford defendant with notice of the offenses for which he ultimately could be convicted. *See Hill v. Perini*, 788 F.2d 406 (6th Cir. 1986); *Asherman*, 739 F. Supp. 718. Just as defendants are deemed to be on notice of statutes such as Fed R. Crim. P. 31(c), permitting instructions on lesser included offenses (*Brewster*, 506 F.2d at 74), so too defendants, through their attorneys, are on notice of a well-settled practice -- derived from statute, case law or both -- that permits a jury to convict based on a theory of the case that differs from the one originally pled. *Hill*, 788 F.2d 406 (state statute and well-settled practice permitted charging defendant as a principal but convicting based on accessorial-liability theory). It is apparent, therefore, that defendant's claim that he was

not provided adequate notice that he faced conviction under a "common law intoxication" theory (V.T.L. § 1192[3]) is completely meritless when examined in the light of well-settled principles of law.

Equally meritless is defendant's claim that his defense at trial was prejudiced by the court's decision to allow the jury to consider the "common law intoxication" theory. Defendant candidly admits that part of his defense was to "discredit [the] probable cause for [his] arrest." Defendant's petition at 14. That strategy necessarily entailed attacking the evidence concerning his erratic driving, the odor of alcohol on his breath, his inability to maintain his balance, his slurred speech, his bloodshot eyes, and his inability to perform two field sobriety tests -- the same evidence used to convict him of driving while intoxicated under a "common law intoxication" theory.

Moreover, it was evident from the prosecutor's opening statement that during the trial the People would be offering evidence of defendant's "common law intoxication." In his opening, the prosecutor addressed, in detail, the evidence of defendant's intoxicated condition, including the alcohol on his breath, his slurred speech, his stagger, his bloodshot eyes, and his inability to perform field sobriety tests (68). Thus, defendant's claim that he was surprised and unprepared to defend against evidence of his "common law intoxication" is belied by the record.

Accordingly, this Court should deny defendant's petition for a writ of certiorari because his claim that he was denied his right to due process and fair notice under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution is completely devoid of merit. Defendant's claim to the contrary is not supported by the law and does not present this Court with any significant legal issues in need of this Court's resolution.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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* *Counsel of Record*
for Respondent

Dated: July 21, 1994

State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

JOHN BELSITO,

Appellant.

CERTIFICATE DENYING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPLR 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
December 14, 1993

S/George Bundy Smith
Associate Judge

Order of the Appellate Term, 9th & 10th Judicial Districts, entered November 3, 1993, affirming a judgment of the District Court, Nassau County, rendered March 1, 1992.

* Description of Order:

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

June 20, 1994

Robert A. Schwartz, Esq.
Assistant District Attorney
Appeals Bureau
Office of the District Attorney
Nassau County
262 Old Country Road
Mineola, New York 11501-4251

Re: People v. John Belsito

Dear Mr. Schwartz:

Enclosed please find a sealed copy of Judge Smith's certificate denying permission to appeal in the above-captioned matter. Such a certificate is entered in the clerk's office on the date appearing on the face thereof.

Very truly yours,

Stuart M. Cohen
Deputy Clerk

enc.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 17, 1994

Raymond G. Lavallee
33 Guy Lombardo Avenue
Freeport, NY 11520

RE: John Belsito v. New York

Dear Mr. Lavallee:

Returned are 39 copies of your petition for a writ of certiorari forward by UPS and received in this office March 16, 1994, for failure to comply with this Court's Rules of Procedure, a copy of which is enclosed. Also enclosed is a sample petition which you may follow as to form.

If you intend to pay the $300 docket fee, the petition must be presented on paper which is 6 1/8 by 9 1/4 inches as stated in Rule 33 of the Rules of this Court. All of the text must be double-spaced and may not be photoreduced. Rule 33.1.(c). The cover of the petition must bear the title of the paper. Rule 33.2.(6). The current term is the October Term 1993.

The affidavit of service must contain the name of counsel served, in addition to the address. Rule 29.

Corrected copies of the petition must be returned

promptly in order for the case to be docketed. This office will retain one copy of the petition and your check in the amount of $300, in expectation of receipt of a properly prepared petition. See Rule 33.7.

Very truly yours,

WILLIAM K. SUTER, CLERK

By

Ruth B. Jones
Assistant Clerk

Enclosures